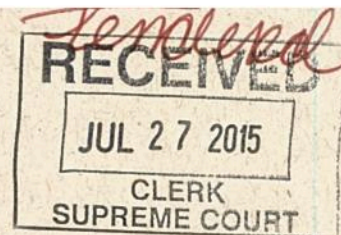


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2015-SC-000194



FAMILY DOLLAR

APPELLANT

vs.

MAMIE BAYTOS,
WIDOW OF STEPHEN BAYTOS, DECEASED
HON. RICHARD M. JOINER, ALJ
HON. THOMAS G. POLITES, ALJ
AND
WORKERS COMPENSATION BOARD

APPELLEES

AMICUS BRIEF ON BEHALF OF THE
KENTUCKY WORKERS ASSOCIATION (KWA)

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of July, 2015, I Federal Expressed the original and ten (10) copies of the forgoing to Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, 700 Capitol Ave. Room 209, Frankfort, KY 40601, and a true and exact copy of the foregoing was mailed to the Workers' Compensation Board, 657 Chamberlin Avenue, Frankfort, KY, 40601; Hon. Thomas G. Polities, ALJ, 2780 Research Park Drive, Spindletop Office Complex, Lexington, KY 40511; Hon. Richard M. Joiner, 145 East Center Street, Madisonville, KY 42431; Hon. Melanie B. Gabbard, Esq., Allen, Kopet & Associates, PLLC, P.O. Box 34048, Lexington, KY 40588; Hon. Carl E. Grayson, *of Counsel*, Blankenship Massey & Associates, PLLC, 504 Erlanger Road, Erlanger, KY 41018; and, Hon. Lewis G. Paisley, Stoll, Keenon, Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507-1801.

Respectfully submitted,

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PRELIMINARY MATTERS

A. Need for oral argument:

The undersigned believes this is an issue that would benefit from oral argument as it appears to be an issue of first impression.

B. Other matters in litigation:

There are no other matters pending in this case besides the issues in this appeal.

STATEMENT OF POINTS AND AUTHORITIES

A. ARGUMENT

I. Standard of Review

- i. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)
- ii. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001)
- iii. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998)
- iv. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001)
- v. *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky.1991).

II. Individuals Entitled to Death Benefits under KRS 342.750 have their own

Individual Claims which are not Derivative of the Workers Claim

- i. KRS 342.730
- ii. KRS 342.730(3)

- iii. KRS 342.750
- iv. KRS 411.140
- v. KRS 411.130
- vi. *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012)
- vii. *Pete v. Anderson*, 413 S.W.3d 291 (Ky. 2013)
- viii. *Brashear v. Old Straight Creek Coal Corp.*, 32 S.W.2d 717 (Ky. App. 1930)
- ix. *Larson's Worker's Compensation, Desk Edition*
- x. *Brunsmann v. Newport Steel Corp.*, 17 S.W.3d 514 (Ky. 2000)
- xi. *Hammons v. Tremco, Inc.*, 887 S.W.2d 336 (Ky. 1994)
- xii. *Tackett v. Betthenergy Mines, Inc.*, 841 S.W.2d 177 (Ky. 1992)

III. The Board's Ruling will have a Chilling Effect on Settlement of Workers' Compensation Claims in the Future

- i. *Elizabethtown Sportswear v. Stice*, 720 S.W.2d 732 (Ky. App. 1986)

INTRODUCTION

The issue to be decided in this case will affect multiple beneficiaries in other work-related death cases and could affect the ability to settle nearly every workers' compensation claim that arises in Kentucky. The Kentucky Workers Association (hereinafter KWA) is a statewide workers' compensation plaintiff's lawyers group which seeks to protect the injured workers and their families in Kentucky. Since the issue in this case could have widespread application and affect multiple claimants, KWA is seeking leave to file this Amicus Brief.

Mamie Baytos' husband died as a result of a work-related injury. Prior to his death, Mr. Baytos had settled his workers' compensation claim. After her husband's work-related death, Mamie Baytos filed for workers' compensation benefits as a specifically named beneficiary listed in KRS 342.750. The ALJ awarded the benefits, but the Workers' Compensation Board [hereinafter "Board"] reversed holding the claim of Mamie Baytos to be derivative of Mr. Baytos' claim and that Mr. Baytos could settle, not only his claim, but the claim of beneficiaries under the work-related death portion of the Workers' Compensation Act found in KRS 342.750. The Board did not cite any authority for its position that the beneficiaries claim is derivative. The Court of Appeals correctly reversed the Board's holding that the claim is not derivative.

The Workers' Compensation Act provides benefits in two sections on account of a worker's death. KRS 342.730 applies when an injured worker dies from causes unrelated to his injury and specifies how the money the worker was to receive pass to survivors. This is akin to a survivor's claim in civil cases. KRS 342.750 provides for benefits to certain specified statutory beneficiaries when a worker dies as a result of a work-related injury. This is akin to a wrongful death action in civil cases. Mamie Baytos' claim was for benefits under KRS 342.750 so it was akin to a wrongful death action. Therefore, the Board's decision was contrary to the holdings of the Kentucky Supreme Court in Pete v. Anderson, 413 S.W.3d 291 (Ky. 2013) and Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012). Therefore the Court of Appeals was correct in reversing the Board's decision and this Court should AFFIRM the Court of Appeals.

STATEMENT OF THE CASE

Stephen Baytos suffered a torn thoracic aorta as a result of a work-related injury on

February 9, 2006. (See Appendix I to the Petition for Review of Ms. Baytos) He settled his claim for workers' compensation benefits by Form 110-I entered July 10, 2008. (See Appendix H to the Petition for Review of Ms. Baytos) The settlement agreement included waivers by Stephen Baytos of **his** rights under the Workers' Compensation Act. The settlement agreement states "[t]his settlement represents a compromised agreement of an adjudicated claim, wherein the Claimant, Steven Baytos agrees to accept the total sum of \$100,000 in consideration for a complete discharge of any claim he may have now or in the future against the Employer" (See Appendix H to the Petition for Review of Ms. Baytos)(Emphasis added). In fact, the language of the release is specifically limited to Stephen Baytos.

The settlement agreement did not mention that it was releasing the claims of a surviving spouse under KRS 342.750. Ms. Baytos did not sign the settlement agreement and did not agree to release any portion of her claims under KRS 342.750. Releases frequently include language that the spouse is releasing their claims for loss of consortium or other claims and the spouse is named in the release and their signature is included on the release. The defendant in this action could have included language in the Baytos agreement that Ms. Baytos was waiving or releasing her claims under KRS 342.750 and included consideration for that release. The defendant failed to do that. Instead, the Board essentially inferred that release into the agreement through faulty legal reasoning.

On December 3, 2009, less than four years later after his work-related injury, Mr. Baytos died from the work-related injury. Mr. Baytos died leaving his un-remarried widow, Mamie Baytos. A claim was made by Mamie Baytos to obtain Widows benefits per KRS 342.750. In an Opinion & Order dated June 19, 2012, Administrative Law Judge Richard Joiner held that

Mamie Baytos' claim in which she had to prove that death was caused by the work injury was not "barred" by the settlement. This claim is entirely the widows and cannot be waived by the employee." (See Appendix C to the Petition for Review of Ms. Baytos) This Opinion & Order was adopted in the February 3, 2014 Order and Opinion of Hon. Thomas Politics, ALJ, in which Mamie Baytos was awarded benefits under KRS 342.750. (See Appendix B to the Petition for Review of Ms. Baytos)

Family Dollar filed an appeal to the Workers' Compensation Board. The Board noted that this appeared to be an issue of first impression. The Board stated:

[I]t is her [Mamie Baytos] position that he was without authority to waive her right to reopen and pursue KRS 342.750(1) income benefits. This argument necessarily rests on the premise that her right to KRS 342.750(1) income benefits is wholly independent from Mr. Baytos' right to benefits. We cannot agree. Any survivor's right to compensation under Chapter 342 is necessarily and inextricably linked to the worker's claim for compensation. Without Mr. Baytos' work-related injury, Mrs. Baytos would have no claim. Had Mr. Baytos not been eligible to be compensated for a work-related injury, Mrs. Baytos would likewise be ineligible. Her claim is derivative of his. (Opinion of the Board at page 3)

The Board just merely made the conclusory statement that Mamie Baytos' claim was derivative without any citation of legal authority or any real analysis. The Board did not address the fact that Mamie Baytos did not sign the agreement. The Board held "a worker's full and final settlement of a claim, the valid waiver of his right to reopen for a worsening condition, and the dismissal of his claim with prejudice effectively bars recovery for his subsequent death as a result of the work-related injury." (Board Opinion at pg. 4)

Mamie Baytos appealed to the Court of Appeals. The Court of Appeals noted that the Workers Compensation Board did not provide any authority for its holding that Mamie Baytos' claim was derivative. The Court of Appeals then noted that the question presented had been

addressed in Brashear v. Old Straight Creek Coal Corp., 236 Ky. 83, 32 S.W.2d 717 (Ky. 1930). Further, the Court of Appeals looked to the learned treatise of *Larson's Worker's Compensation, Desk Edition* and holdings from other states. The Court of Appeals correctly held that the claim for death benefits by a dependent widow was not derivative of the injured worker but that she had her own independent claim.

QUESTION OF LAW INVOLVED

The question of law involved in this claim is whether individuals entitled to death benefits under KRS 342.750 have their own individual and separate claims or whether they are derivative claims. This is a question of law.

ARGUMENT

I. Standard of Review

Generally, the standard of review of a workers' compensation decision in the Supreme Court is to address new questions of statutory construction or to reconsider precedent. Western Baptist Hosp. v. Kelly, 827 S.W.2d 685 (Ky.1992). Pursuant to Western Baptist Hosp. v. Kelly at 687-88, appellate review of any workers' compensation decision is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. However, the standard of review is different when the Court is dealing with issues of law. As a reviewing court, this court is not bound by an ALJ's decision on questions of law or an ALJ's interpretation and application of the law to

the facts. In either case, the standard of review is *de novo*. Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App.2001); Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky.App.1998). *De novo* review allows Appellate Courts greater latitude in reviewing an ALJ's decision. Purchase Transportation Services v. Estate of Wilson, 39 S.W.3d 816, 817-18 (Ky. 2001); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991)

II. Individuals Entitled to Death Benefits under KRS 342.750 have their own Individual Claims which are not Derivative of the Worker's Claim

The Appellant argues that when an injured worker settles his workers' compensation claim completely and later dies as a result of the work injury, it bars a claim by the widow or dependent child for death benefits under the Workers' Compensation Act. The Appellant's argument means that the fact that the widow or dependent child does not sign the settlement is irrelevant because, according to the Appellant, their claim is derivative. The Appellant's arguments are incorrect legally and contrary to established precedent. Therefore, the Court of Appeal's decision should be affirmed.

KRS Chapter 342 contains the Workers Compensation Act. KRS 342.730 specifies the benefits an injured work receives as a result of an on the job injury. KRS 342.730(3) sets forth how money that is owed to the injured worker is paid if the worker dies from non-work related causes before all of the compensation benefits are paid. KRS 342.750 provides that certain statutory beneficiaries receive in compensation when a

worker dies as a result of a work-related injury. This statute also provides that the death must occur within four years of the injury.

It is very clear that the Workers Compensation Act essentially mirrors civil law in regard to these matters. KRS 411.140 provides that a personal injury action survives when the claimant dies such that the estate can recover the amount the injured person was entitled to recover if they had lived. This is commonly called a “survival action.” This is exactly the same type of claim that is discussed in the Workers Compensation Act in KRS 342.730(3). In addition to the “survival action” of KRS 411.140, the statutes provide for damages that go to certain specified beneficiaries when someone negligently causes the death of another. This is found in KRS 411.130 and is commonly referred to as a “wrongful death action.” The “wrongful death action” of KRS 411.130 is exactly the same as provided for in the Workers Compensation Act in KRS 342.750.

Since death benefit claims pursuant to 342.750 mirror “wrongful death” actions, this Court should have looked to how it has addressed similar issues in “wrongful death” actions. If the Court looks at the case law, the Court will see that the claims of the beneficiary in a “wrongful death” action are not derivative but they are separate and distinct claims that belong to the beneficiary. (See Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012). In Ping, the Supreme Court of Kentucky held that the injured person cannot sign an arbitration agreement that would be binding on the separate and independent claims of the beneficiaries for “wrongful death.” Clearly, if the injured person cannot bind the “wrongful death” beneficiaries to

arbitration, surely that person could not sign a release that released the “wrongful death” claims of another. However, that is exactly what the Appellant argues should occur in workers’ compensation cases.

The Supreme Court recently reiterated its position that “wrongful death” beneficiaries have a separate and distinct claim from that of the deceased. In Pete v. Anderson, 413 S.W.3d 291 (Ky. 2013), the Court stated:

“Finally, this Court’s recent decision in Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012) puts to rest any dispute as to whether the statutory beneficiaries are the real parties in interest to a wrongful death action. In Ping, the administrator of the estate of a woman who had been a long-term care facility resident brought suit against the operators of the facility alleging negligence resulting in injuries causing the woman’s death. 376 S.W.3d at 586. Our opinion, which resolved the question of whether a decedent can bind his or her beneficiaries to arbitrate a wrongful death claim, examined the distinction between the wrongful death statute and the survival statute. [citation omitted] We concluded that while a survival action is derivative of a personal injury claim which belongs to the estate, a wrongful death action is an independent claim belonging to the intended beneficiaries under KRS 411.130, a claim that “accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss.” Id. at 598-599 (Pete v. Anderson 413 S.W.3d at page 300)

While the Board indicated that this was an issue of first impression, the Board actually cited to a previous Court of Appeals case that did address this issue. Brashear v. Old Straight Creek Coal Corp., 32 S.W.2d 717 (Ky. App. 1930) is factually similar to the case at bar and the holding is directly on point. The claimant fully settled his claim during his life. After his subsequent death as a result of his injuries, his wife sought to reopen the claim to assert her entitlement to benefits. The lower court had summarily dismissed the motion. The Court of

Appeals in Brashear directed the lower court to consider the merits of the motion stating, "If he acknowledged a final settlement, that would not prevent an award to the widow, if, in truth and in fact, his death was brought about as the direct result of his injuries so received." *Id.* at 718. Further, the court stated, "[T]he widow was within her rights in filing her original application for compensation and the board should have granted her a hearing and allowed her to produce her proof. Her motion to reopen the case should properly be treated as a motion to reopen so far as the application which she had filed was concerned. **The compensation due her, if any, is quite a different thing from the compensation paid to her husband.**" *Id.* at 718. This is authority that the Court of Appeals relied upon in reversing the Board's decision in this claim. Therefore, the issue has been specifically decided in Kentucky.

The Appellant argues that this Court should ignore binding precedent because it is an old decision and there had been changes made to the statute. The Appellant does not point out any changes in the statute that would be relevant to the issue presented in this case. Instead the Appellant cites the court to Brusman v. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). The Court in Brusman merely pointed out that the change in the statute removed the requirement that a surviving spouse or minor child had to establish dependency to be entitled to the death benefits. That case has no bearing on the issue presented in this appeal.

The Board acknowledged that several states have decided this issue in the way that is favorable to Mamie Baytos and consistent with the published authority of Kentucky. The Board stated: "Indeed, many states adhere to the policy that a settlement agreement cannot bind the worker's dependents in the event of his later death as a result of the work-related injury. See generally 100 CJS Workers' Compensation § 882." (Board Opinion at pg.4) The Board did not

cite one jurisdiction that had ruled the way it ruled in this case. The Court of Appeals noted in its decision that its reliance on the binding precedent of Brashear, supra, is bolstered by the persuasive authority from Larson, supra, and the holdings in other states.

Further, in Kentucky when a person dies as a result of a work-related injury, multiple entities may be able to pursue a claim. The Estate may be entitled to a lump-sum benefit. The surviving spouse may be entitled to income benefits. Surviving children may be entitled to a benefit. (See KRS 342.750) Published authority in Kentucky says that each individual entity must pursue its own claim and that one entity cannot pursue the claim on another's behalf. Specifically, in Hammons v. Tremco, Inc., 887 S.W.2d 336 (Ky. 1994), the Court noted that the **personal representative of the Estate has to appear as a party to assert its rights and that each dependent also had to personally appear in the case and assert their rights for the Court to have jurisdiction over them.** (Hammons at pg. 338) It is not logical for Kentucky law to say that a beneficiary has to pursue their own individual claim and no one can pursue the death benefit on a beneficiary's behalf but then say that someone other than the beneficiary can settle that claim. However, that is the result if the Appellant's position is accepted.

In its brief, Appellant cited Tackett v. Betthenergy Mines, Inc., 841 S.W.2d 177 (Ky. 1992). That claim involved an Estate filing a claim for Coal Workers Retraining Incentive benefits after the worker had died from non-work related causes. The Court noted that the purpose of those benefits was to allow a worker with pneumoconiosis to be retrained and seek employment outside the mine so that there pneumoconiosis does not progress. Obviously, the worker could not be retrained after he had died and neither worker had applied for the benefit before he died, so there was no claim to continue under KRS 342.730. Further, Tackett dealt

with survivor's benefits being claimed under KRS 342.730(3), which as stated earlier is akin to a survivor's claim and is derivative. However, Mamie Baytos' claim is under KRS 342.750 and is akin to a wrongful death claim and is not derivative. Therefore, Tackett has no bearing on the outcome of this case.

III. The Board's Ruling will have a Chilling Effect on Settlement of Workers' Compensation Claims in the Future

Part of the Appellant's argument is that the Workers Compensation Act encourages the settlement of claims. While the Appellant argues that the ALJ and Court of Appeals decisions would frustrate that principal this is not true. In fact, accepting the Appellant's position would cause an impediment to settlement, as it will make settlement of claims much more difficult, if not impossible. Generally, workers' compensation claims resolve within four years of the injury. Generally, defendants want a release. If the work injury results in death within four years of the injury, then the beneficiaries in KRS 342.750 have a claim for death benefits. The Appellant argues that a settlement of the injured workers claim should bar a claim for death benefits even though:

1. The ones holding those separate and distinct claims did not signed the agreement;
2. The ones holding the claims did not receive any consideration; and,
3. The death has not yet occurred, so the claims have not yet ripened.

Workers frequently are still receiving medical treatment when a case resolves. In every workers' compensation claim, there is the potential that the worker will have an adverse reaction to medication and die as a result of treatment for the work injury, which would then entitle the

beneficiaries of KRS 342.750 to benefits under the Act. (See Elizabethtown Sportswear v Stice, 720 S.W.2d 732 (Ky. App. 1986). If the Appellant's position were to become law, plaintiff's counsel will have to obtain additional money in every settlement agreement for a waiver of these potential claims and will have to obtain the signature of the beneficiaries. If the injured worker has minor children, counsel will have to seek approval from District Court for the settlement. Of course, it will be nearly impossible to obtain any money from the carrier for potential claims that will likely never become a reality.

The Appellants argument that settlements will be hindered by the Court of Appeals holding is demonstrably false. The Court of Appeal's decision was underpinned by the binding authority of Brashear, supra. Brashear is nearly identical to the case at bar. Brashear was decided in 1930. Therefore, if this interpretation of the law was going to make it difficult to settle workers' compensation cases, this difficulty would have occurred in the 85 years since Brashear was decided.

There is a strong encouragement and public policy favoring the prompt resolution of claims by settlement agreement. However, the Appellant's argument will frustrate that public policy and will have a chilling and detrimental effect on settlement of claims. Allowing claims to only be settled by the persons that actual hold the claims will encourage settlements.

CONCLUSION

KRS 342.750 claims for death benefits are claims similar to "wrongful death" claims. The claim is a separate and individual claim that belongs to the beneficiaries listed in the statute. The claim is not derivative of the workers claim. The only person that can pursue or settle that

claim are the beneficiary themselves. (See Brashear, supra; Pete v. Anderson, 413 S.W.3d 291 (Ky. 2013); Ping v. Beverly Enterprises, Inc.; 376 S.W.3d 581 (Ky. 2012); and, Hammons v. Tremco, Inc., 887 S.W.2d 336 (Ky. 1994). The Court of Appeals held that Stephen Baytos could not settle a claim that belonged exclusively to Mamie Baytos. That decision should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffery A. Roberts", is written over a horizontal line.

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